

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR 08-1389

RODNEY A. PANKAU

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered JUNE 24, 2009

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT,
[NO. CR2008-798-1]

HONORABLE WILLIAM A. STOREY,
JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Rodney Pankau appeals his convictions for residential burglary and attempted rape after a jury trial in Washington County Circuit Court. Appellant challenges the sufficiency of the evidence presented to the jury to demonstrate that he was the person who broke into the victim's home and attempted to rape her. Specifically, appellant argues that: (1) the victim's testimony was inconsistent and her identification of appellant too remote in time from the attack; (2) the police's photographic lineup was unduly suggestive; and (3) the DNA evidence was merely circumstantial and not conclusive as to guilt. The State contends that parts one and two of appellant's argument are not preserved for review and that part three of appellant's argument is not persuasive. We agree with the State. Therefore, we affirm.

We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *See Wertz v. State*, 374 Ark. 256, __ S.W.3d __ (2008); *Stephenson v. State*, 373 Ark. 134, __ S.W.3d __ (2008). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Wertz, supra*. Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.* On appeal, we view the evidence in the light most favorable to the State, considering only the evidence that supports the verdict. *Id.*

A party is bound by the nature and scope of the arguments made at trial, and we will not consider an argument raised for the first time on appeal. *Watson v. State*, 358 Ark. 212, 188 S.W.3d 921 (2004); *Hunter v. State*, 330 Ark. 198, 952 S.W.2d 145 (1997). In addition, Rule 33.1(a) of the Arkansas Rules of Criminal Procedure requires a motion for directed verdict to “state the specific grounds.” *Gardner v. State*, 364 Ark. 506, 221 S.W.3d 339 (2006).

The victim in this case, A. P., a single mother living in Springdale, Arkansas, identified appellant as the man who broke into her home at approximately 3:00 a.m. on March 23, 2007, attacked her in her bed, and attempted to rape her, before fleeing on foot. She described him as a white male, a bit older than her twenty-nine years, who had blonde or gray coarse hair, and who dressed in construction-worker attire; he smelled of smoke and alcohol. A.P. testified that the man was in her house for nearly an hour, and she fought his

attempts to force her to perform oral sex on him. As soon as the man left her house, A.P. called 911 and locked herself in a bedroom with her two children. The police responded, searched the house, and found a baseball cap with a local construction company logo “Crossland Construction Company” on it. DNA testing revealed genetic material in the cap from two individuals, neither of whom were A.P. The greater presence of DNA matched that belonging to appellant.

Appellant had undisputedly been working in the Springdale area for Crossland Construction Company, and appellant had resided in an Extended Stay America hotel in Springdale during the relevant period of time. Appellant also signed into a local drinking establishment on the night of the attack. This bar, as well as the Extended Stay America, were located less than a mile from the victim’s home. In a statement to police, appellant admitted that “every time I’ve gotten in trouble I drank and did something crazy.” Appellant admitted that the baseball cap was his.

The victim quickly identified appellant in a photographic lineup more than a year after the attack, when appellant’s photo was among six other white middle-aged males. At trial, A.P. positively identified appellant as the perpetrator. While A.P. was unable to see if appellant had tattoos on his arms on the night of the attack, and while she was incorrect in her assumption that appellant was left-handed, A.P. was resolute that she had identified the right man.

At the conclusion of the State's presentation, appellant's attorney moved for directed verdict, stating:

[W]e don't believe based upon the evidence presented by the State that any reasonable juror could find that Rodney Pankau committed the crime of – this charge of burglary and attempted rape. Specifically, Your Honor, the only physical evidence that ties Mr. Pankau to the scene of the crime is a Crossland Construction Company baseball cap and that baseball cap, Your Honor, has the DNA of two distinct individuals. For that reason, Your Honor, along with the other lack of substantial evidence, we would respectfully ask for a directed verdict[.]

Appellant challenged the State's proof only insofar as the DNA testing proved that another person had used appellant's baseball cap. Nowhere did appellant assert that the victim's testimony was inconsistent or too late in time to properly identify appellant as the person who committed these crimes. Nowhere did appellant challenge the method or means of presenting photo identification to A.P. No motion to suppress was entered on that basis either. Thus, these aspects of the argument on appeal are not preserved for appellate review. *See Ark. R. Crim. P. 33.1(c)*.

Even had we considered the argument on appeal, that the victim's testimony was not to be believed, it would not present a reversible issue. The credibility of witnesses is a matter for the jury's consideration. *Tryon v. State*, 371 Ark. 25, 263 S.W.3d 475 (2007). Where the testimony is conflicting, we do not pass upon the credibility of the witnesses. *Davenport v. State*, 373 Ark. 71, 281 S.W.3d 268 (2008). The testimony of a rape victim, standing alone, is sufficient to support a conviction if the testimony satisfies the statutory elements of the crime. *See Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007).

Appellant's other argument on appeal is that the DNA evidence found in the baseball cap found at the victim's residence by the police contained his DNA but also that of another unidentified person, and therefore did not exclude the reasonable hypothesis that the other person was the guilty party. We disagree.

Even if circumstantial, the DNA evidence was compelling evidence when added to the victim's positive identification of her attacker and to the evidence that appellant lived, worked, and drank within a mile of A.P.'s residence on March 23, 2007.

Because there is sufficient evidence to support the jury's findings of guilt for residential burglary and attempted rape, we affirm.

Affirmed.

GRUBER and BROWN, JJ., agree.